STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN WALKER,

Defendant-Appellant.

UNPUBLISHED
March 1, 2005

No. 239711
Wayne Circuit Court
LC No. 01-003031

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison without parole for the first-degree murder conviction, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel. We disagree.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed by this Court de novo. *Id.* Factual findings are reviewed for clear error. *Id.* To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant. *Daniel*, *supra* at 58. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Pickens*, *supra* at 314. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel*, *supra* at 58.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Defendant alleges four instances of defense counsel's failure to provide effective assistance of counsel, all involving defense counsel's decision whether to call certain witnesses at trial. Defendant argues that he was denied effective assistance of counsel through: (1) defense counsel's failure to call Dr. Fowler to testify that the victim was comatose and unresponsive during his hospital stay; (2) defense counsel's failure to call the investigator who interviewed Dr. Navarra to impeach her trial testimony that the victim was alert and responsive during his hospital stay; (3) defense counsel's failure to call an expert witness whose testimony would have established that the victim could not have been shot from the driver's side of his vehicle based on injuries on the right side of his hip; and, (4) defense counsel's failure to call an attorney, whose purported testimony, defendant argues, would have eliminated defendant's motive to kill the victim as defendant was attempting to recover damages for his vehicle from the valet company from where the vehicle was stolen. The decision whether to call witnesses is a matter of trial strategy. *Daniel, supra* at 58. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra* at 58.

Because each of defendant's allegations deal with defense counsel's decision whether to call a witness at trial, which is presumed to be trial strategy, the only issue is whether these decisions deprived defendant of a substantial defense that would have affected the outcome of the proceeding. Defendant's first two allegations of ineffective assistance, that defense counsel failed to call Dr. Fowler and the investigator that interviewed Dr. Navarra, both deal with purported testimony that would cast doubt on trial testimony that the victim was alert and responsive during his hospitalization. On this matter, we remanded the case for a *Ginther*[1] hearing, which was held on October 31, 2003. *People v Walker*, unpublished order of the Court of Appeals, entered August 7, 2003 (Docket No. 239711). Having reviewed the transcript, we find that, assuming counsel's performance to be deficient, defendant failed to demonstrate prejudice, or in other words, defendant did not establish a reasonable probability that the result of the proceeding would have been different. At the *Ginther* hearing, trial counsel and the investigator testified regarding the investigator's interviews with Drs. Fowler and Navarra that were conducted more than a year after the victim's treatment in the hospital. Both doctors allegedly indicated that the victim was unresponsive and comatose during the entire hospital stay. This would directly contradict Dr. Navarra's testimony at trial. Trial counsel testified that he should have called Dr. Fowler to the stand at trial and should have attempted to impeach Dr. Navarra, which matters were critical to the defense. According to the investigator, he had the victim's medical records with him when he interviewed the doctors, and he made those records available if the doctors wished to review them in answering questions. However, Dr. Fowler did not review the records but was adamant that the victim was totally unresponsive, and the investigator could not recall if Dr. Navarra reviewed the records when answering questions during the interview. Dr. Navarra was short with the investigator, and she did not want to be interviewed but did so reluctantly.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The medical records support Dr. Navarra's trial testimony that the victim was awake, alert, and responsive during various parts of his hospitalization. Dr. Fowler himself, in a consultation report admitted into evidence along with the victim's other medical records, wrote that "[the victim] was taken to the CAT scan suite and at that time the patient started complaining of severe abdominal pain, was combative and pulled out his lines." If Dr. Fowler had testified, he may have testified consistent with the interview report generated by the investigator and may have been able to logically explain why the medical records were not inconsistent with his opinion or why the records were somehow negated from a medical viewpoint. It is possible, however, that Dr. Fowler may have changed his position or opinion on review of the medical records or after having considered the matter in greater detail. Further, it is possible that Dr. Fowler may have denied or qualified the contents of the investigator's report, which was produced from the investigator's notes and not on the basis of any type of audio or video recording. In that case, his testimony would have further damaged the defense. The same can be said regarding Dr. Navarra had their been an attempt to impeach her testimony. Therein lies the problem; defendant did not present the testimony of either doctor at the *Ginther* hearing and thus failed to show prejudice.

The following relevant passage is found in *Pickens, supra* at 327:

> [D]efense counsel's failure to properly file notice of an alibi was inexcusable neglect. Her own testimony at the *Ginther* hearing disclosed that she was aware of Wright's potential alibi testimony nearly three months before trial, yet she failed to file a timely notice or move for an adjournment to correct her error. Hence, her performance fell below the professional norm.
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> Nevertheless, Pickens has failed to establish the required showing of prejudice. Although the alibi witness was subpoenaed, he did not testify at the evidentiary hearing. Instead, for unexplained reasons, Pickens waived his production. Accordingly, no evidence has been presented to establish that the alibi witness would have testified favorably at trial. In other words, Pickens failed to establish that the alibi witness' testimony would have altered the result of the proceeding.

Here, there was also no explanation why the doctors were not called to testify at the *Ginther* hearing even after the prosecutor emphasized their lack of presence to the trial court. We cannot definitively conclude that Dr. Fowler would have testified in defendant's favor at trial, or that Dr. Navarra would have been successfully impeached. Moreover, other evidence pointed to defendant's guilt, including an ongoing feud between defendant and the victim, a death threat against the victim made by defendant, a prior shooting involving defendant and the victim, and an eyewitness claim that defendant was the perpetrator of the fatal shooting. On this record, reversal is unwarranted.

Defendant's third allegation of ineffective assistance, that defense counsel failed to call an expert witness to testify that the location of the victim's injuries would require the shots to have come from the passenger's side of his vehicle, deals with purported testimony that would cast doubt on defendant being the shooter. Defendant was not deprived of a substantial defense that would have affected the outcome of the proceeding. Defense counsel cross-examined a female witness, who placed defendant on the driver's side of the vehicle and identified him as

the shooter, and another witness, who also placed the shooter on the driver's side of the vehicle. Additionally, defense counsel cross-examined two police officers who both testified that the window of the driver's side door was shattered, and one of the officers further testified that the driver's side door appeared to have a bullet hole in it. Moreover, it is reasonable to conclude that the victim may have maneuvered, in an attempt to avoid being shot, in such a manner as to expose his right side to gunfire. Therefore, defendant has failed to overcome the presumption that his counsel's decision not to call this witness was sound trial strategy. Additionally, because there was other evidence indicating that the victim was shot on his right side, defendant was still able to argue that the shooter could not have fired from the driver's side of the vehicle. Therefore, defendant suffered no prejudice.

Lastly, defendant alleges ineffective assistance because defense counsel failed to call an attorney whose purported testimony, that he filed suit on behalf of defendant to recover damages for his stolen vehicle from the valet company from which it was stolen, would have provided defendant with a defense of lack of motive. Defendant was not deprived of a substantial defense that would have affected the outcome of the proceeding. There was evidence showing that defendant claimed the victim stole more than simply his car. Because defendant was seeking the return of, or compensation for, more than just his vehicle, recovering money from the valet company for the vehicle would not necessarily eliminate his motive to kill the victim. Additionally, defendant may very well have wanted to pay back the personal affront he felt that resulted from the victim stealing the property. We see no prejudice because, assuming the testimony was presented, it would not have contradicted the claim that the victim took defendant's vehicle. Reversal is not warranted.

Defendant's second issue on appeal is that the trial court committed reversible error by finding that the victim's nod of his head in the affirmative constituted a dying declaration. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). An abuse of discretion will be found "only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of evidence, the issue is reviewed de novo." *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002).

There are four requirements that must be met before a statement can be admissible as a dying declaration: (1) the declarant was conscious of impending death, (2) death actually ensued, (3) the statements are sought to be admitted against one who killed the decedent, and (4) the statements relate to the circumstances of the killing. MRE 804(b)(2); *People v Parney*, 98 Mich App 571, 583; 296 NW2d 568 (1979).[2] In this case, the victim's consciousness of

[2] In reviewing the factors, the trial court must reach factual conclusions that are reviewed for clear error. *Parney, supra* at 583.

impending death is disputed. "Consciousness of death" requires that the declarant was actually *in extremis*, or near the point of death, at the time the statement was made, and in fact believed his death was impending. *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988). It is not necessary, however, for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration. *Id.* The fact of a declarant's belief of impending death may be proven by circumstances surrounding the event. *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev'd on other grounds 406 Mich 888 (1979).

The dying declaration at issue took place on June 16, 2000, the victim's third day in the hospital. The victim's family members asked him: "Did Juan [defendant] do this to you?" The victim shook his head "yes." Defendant first argues that this exchange did not take place, as the victim was comatose and unresponsive during his hospitalization. However, the medical records and witness testimony indicate the contrary. Dr. Navarra testified that the victim was awake and responding to stimuli while in the intensive care unit. Dr. Navarra could communicate with the victim, as he would squeeze her hand in response to questions. Dr. Navarra further testified that on June 16, 2000, it would have been possible for the victim to respond to yes/no questions, and he would have been able to move his head up-and-down and side-to-side, in a yes/no manner. Additionally, family members testified that the victim was alert and responsive, with his eyes open, when they visited him on June 16, 2000. The medical records for June 16, 2000, appear to corroborate this testimony. The nurses' notes state that "patient wakes up on verbal stimuli, and he opens his eyes and he squeezes hand on command," and the critical care progress notes state that "[patient] squeezes hand and opens his eyes." Therefore, defendant's first argument is without merit. Ultimately, in light of some evidence supporting the prosecution's position, it was for the jurors to decide, in rendering the verdict, if they believed that the victim was capable of knowingly responding to the question posed by family members, or if in fact the family members were being truthful with respect to their testimony.

In the alternative, defendant argues that the victim was not *in extremis* at the time the statement was made. However, considering the circumstances surrounding the event, the trial court did not commit clear error in finding that the victim was *in extremis* at the time the declaration was made. The victim had been shot multiple times. He had undergone two surgeries in two days to control his bleeding. He was in the intensive care unit, could not talk as tubes were down his throat, and could not move his lower extremities. The victim was not administered pain medication after his second surgery because his blood pressure and other vital signs were unstable. There was testimony that family members were praying with the victim immediately before the statement was made, and that the victim had "complete fear in his eyes." Dr. Navarra testified that she was more concerned about his health than who shot him. The victim died the following morning, on June 17, 2000. It cannot be concluded that an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. There was no abuse of discretion in allowing the evidence.[3]

[3] Defendant submitted supplemental authority, citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), for the proposition that the Confrontation Clause bars evidence of the victim's nod of his head implicating defendant. In *Crawford*, the United States
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Defendant's third issue on appeal is that the trial court erred in disqualifying one of the jurors. We disagree. This Court reviews for an abuse of discretion a trial court's decision to remove a juror. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Defendant argues that the trial court abused its discretion in excusing Juror X because the prosecution did not meet its burden to show juror bias. The trial court, defendant argues, simply believed the victim's father, over Juror X, who said he saw the juror walking and talking with a member of defendant's family while leaving the courthouse. However, defendant ignores the trial court's primary reason for excusing Juror X; he was sleeping throughout most of the trial. The trial court was clear that the juror would be excused for sleeping throughout the trial, regardless of the alleged contact with someone associated with defendant's family. MCL 768.18 provides, in pertinent part: "Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12." Clearly, if a juror is sleeping throughout the trial, he will not be able to perform his role as a juror. It cannot be concluded that an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.

Defendant's fourth issue on appeal is that the trial court erred in denying defendant's motion to quash. We disagree.

A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial.

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Supreme Court held that a "testimonial" statement made by an unavailable witness against a defendant is not admissible if the defendant had no opportunity to cross-examine the witness regardless of state evidentiary laws. However, where nontestimonial hearsay is at issue, state hearsay law is applicable. *Id.* at 1374. *Crawford* involved an ex parte police interrogation of a witness who was unavailable at trial, which produced what the Court deemed "testimonial" statements or hearsay without opportunity for cross-examination, and which the Court found inadmissible under the Confrontation Clause. Examples given of "testimonial" statements included those flowing from ex parte in-court testimony, affidavits, custodial examinations, pretrial statements reasonably expected to be used prosecutorially, formalized testimonial materials, confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 1364. We first note that *Crawford* specifically discussed dying declarations. *Id.* at 1367 n 6. The Supreme Court stated that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Id.* The Court further stated that "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations[,]" which the Court indicated would be a unique historical exception. *Id.* Even assuming that no such exception exists, the dying declaration here was not testimonial in the sense envisioned by the Court in *Crawford.* The evidence was derived in an informal, emotional setting between family members, where the participants were discussing death and spirituality with no indication that the question by family members regarding the shooter was specifically intended to further an investigation and prosecution. There was no police or prosecutorial involvement in the family discussion. Thus, we find that the evidence did not constitute a "testimonial" statement and was subject to, and admissible under, Michigan's hearsay laws.

People v Libbett, 251 Mich App 353, 357; 650 NW2d 407 (2002). It is the duty of the magistrate to bind the defendant over for trial if it appears at the conclusion of the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant committed it. *Siler, supra* at 250. In this case, the magistrate found sufficient probable cause to bind defendant over, based partly on information derived from a dying declaration that was admitted into evidence. Defendant filed a motion to quash before trial, arguing that without the admission of the purported dying declaration, there was insufficient evidence to bind defendant over for trial. The trial court, in denying defendant's motion to quash, found that the district court did not abuse its discretion in admitting the dying declaration under MRE 804(b)(2).

Defendant argues that the trial court erred in denying the motion to quash, as there was insufficient evidence to bind defendant over for trial. The purported dying declaration should not have been admitted, defendant argues, as the victim was not conscious of impending death. Reversal is not warranted because we have concluded that the dying declaration was properly considered, and because, even assuming error at the preliminary examination based on the evidence presented at that time, it was harmless in light of the evidence later presented at trial supporting admission of the declaration. *People v Hall*, 435 Mich 599, 613-614; 460 NW2d 520 (1990).

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper